SUPREME COURT, U. S.

MICHAEL RODAK, JR., CL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-480

HENRY R. DEERING,

Petitioner,

vs.

CITY OF SEATTLE, a Municipal Corporation, and THE SEATTLE CIVIL SERVICE COMMISSION, HERBERT STEPHENS, Chairman, E. A. COOK and MERLIN BROWN, Members,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals
of the State of Washington

JOHN D. BLANKINSHIP
LYNN O. HURST
JEFFREY L. PEWE

MONTGOMERY, PURDUE, BLANKINSHIP & AUSTIN

1515 Norton Building
Seattle, Washington 98104,

Counsel for Petitioner.

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

HENRY R. DEERING,

Petitioner,

vs.

CITY OF SEATTLE, a Municipal Corporation, and THE SEATTLE CIVIL SERVICE COMMISSION, HERBERT STEPHENS, Chairman, E. A. COOK and MERLIN BROWN, Members,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals
of the State of Washington

JOHN D. BLANKINSHIP
LYNN O. HURST
JEFFREY L. PEWE

MONTGOMERY, PURDUE, BLANKINSHIP & AUSTIN

1515 Norton Building
Seattle, Washington 98104,

Counsel for Petitioner.

INDEX

CITATIONS TO OPINIONS BELOW. 2

STATEMENT OF JURISDICTION. 2

QUESTION PRESENTED 3

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED. 3

STATEMENT OF THE CASE. 4

REASONS FOR GRANTING THE WRIT. 10

I. The Decision of the Washington Court of Appeals Below is in Conflict With This Court's Holding in Ward v. Village of Monroeville, 409 U.S. 57 (1972). 10

II. The Decision of the Washington Court of Appeals Below is in Conflict in Principal With This Court's Decisions. 13

III. Importance of Decision by the Supreme Court of the Issue Presented 18

CONCLUSION 27

APENDIX A:

Opinion of the Washington Court of Appeals. A-1

Order of the Washington Court of Appeals Denying Petition for Rehearing A-13

Order of the Washington Supreme Court Denying Petition for Review. A-14

Findings of Fact and Conclusions of Law of the Superior Court for King County, Washington A-14

Findings of the Seattle Civil Service Commission. A-21

APPENDIX B:

City of Seattle Charter Provisions. B-1

City of Seattle Civil Service Laws and Rules. B-2

Seattle Fire Department Regulations B-2

TABLE OF AUTHORITIES

Cases:

Bell v. Burson, 402 U.S. 535 (1970) 14, 15

Board of Regents v. Roth, 408 U.S. 564 (1972) 10, 15, 18

Foster v. Carson School District, 63 Wn.2d 29, 385 P.2d 367 (1963) . . 13

Goldberg v. Kelly, 397 U.S. 254 (1969) 15

McTiernan v. Gronouski, 337 F.2d 31 (2d Cir. 1964). 11, 12

Opp Cotton Mills v. Administrator, 312 U.S. 126 (1940). 15

Perry v. Sinderman, 408 U.S. 593 (1972) 15

Ward v. Village of Monroeville,
409 U.S. 57 (1972) 10, 11, 25

Wisconsin v. Constantineau,
400 U.S. 433 (1970). 15

Constitution:

Constitution of the United States
Fourteenth Amendment 3

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No._____

HENRY R. DEERING,

Petitioner,

vs.

CITY OF SEATTLE, a Municipal Corporation, and THE SEATTLE CIVIL SERVICE COMMISSION, HERBERT STEPHENS, Chairman, E. A. COOK and MERLIN BROWN, Members,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals
of the State of Washington

The petitioner, Henry R. Deering, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Washington which became final on July 30, 1974, upon entry of an order by the Supreme Court

of the State of Washington denying petitioner's application for review of the opinion and judgment of the court below.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals of Washington affirming petitioner's dismissal is reported as Deering v. Seattle, 10 Wn. App. 832, 520 P.2d 638 (1974), and is printed in Appendix A, p. A-1.

The unreported findings of fact and conclusions of law of the Superior Court of King County, Washington are printed in Appendix A, p. A-14. The unreported findings of the Seattle Civil Service Commission are set forth in Appendix A, p. A-21.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals of Washington which petitioner seeks to have this court review became final on July 30, 1974, upon entry of an order by the Supreme Court of Washington denying

petitioner's application for review of the lower court's decision. Jurisdiction to review this judgment by writ of certiorari is conferred on this court by Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

If the constitutional right of a public employee to procedural due process at the hearing held prior to termination of his employment is violated, are such violations necessarily cured by another hearing held only after the termination has become effective and thus of no legal consequence?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Constitution.

Amendment XIV, Section 1:

nor shall any state deprive any person of life, liberty, or property, without due process of law;

STATEMENT OF THE CASE

In October, 1959, petitioner Henry Deering was first appointed as a City of Seattle Fireman. After satisfactorily performing his duties for the next six months, petitioner Deering was promoted from probationary status to "regular" status and thereafter enjoyed the employment security created by the city's civil service system and fire department regulations (Findings of Fact I, App. A., p. A-16).

These regulations afford procedural and substantive job protection by providing that each employee of regular status is to continue to hold office unless discharged for adequate, identified cause (App. B, p. B-2). If charges are made against an employee, a trial board is convened to hear the evidence for and against the employee. If the trial board concludes that termination is necessary, its recommendation is forwarded to the department chief

for the official action which terminates the employment, unless the department chief chooses to lessen the penalty.

While the department chief is empowered to lessen or eliminate the penalty recommended by the trial board, he does not have authority to increase the penalty. Consequently, an employee can be terminated only if the trial board fails to find sufficient extenuating circumstances to recommend a less severe penalty than termination.

Eight years after his appointment, petitioner was notified of charges of incompetance and cowardice filed against him by a superior officer and that a trial board composed of department officers would be convened to consider the charges. At the conclusion of the trial board proceeding, the board recommended to the department chief that petitioner's employment be terminated (Opinion of the Court of Appeals,

App. A, P. A-1)

In petitiner's case, the fire department chief did not intercede to moderate the recommendation, and petitioner's employment as a city fireman was at an end.

The hearing before the trial board, which was the only tribunal with the power to deprive petitioner of his employment, is the crux of this case. The trial board denied petitioner even the semblance of procedural due process.

Without contradiction, petitioner has claimed throughout, and the decision below expressly assumed, that his right to due process was violated by (Opinion of the Court of Appeals, App. A, p. A-7 and 8) the trial board's actions. Petitioner has argued that his right to due process was denied when:

1. The trial board denied petitioner both an opportunity to cross examine witnesses against him and an opportunity to present witnesses

in his behalf.

2. The trial board denied petitioner even an opportunity to communicate by written note or whispered conversation with his counsel, who was compelled to remain mute throughout the hearing.

3. The trial board subjected petitioner to accusatory questioning, interruptions and baiting accusations that difference in testimony meant that petitioner was accusing his superior officers of perjury.

The atmosphere of the hearing was so overheated that shouting and hollering rendered the recording of the hearing unusable. The ultimate indignity was the direct order by the presiding officer at the conclusion of the hearing that petitioner answer whether he was satisfied with the hearing he had received.

Following the fire department action terminating his employment, petitioner appealed to the City of Seattle Civil Service Commission; followed by an action for writ of mandamus in the Superior Court for King County, followed by appeal and peti-

tion for rehearing to the Washington State Court of Appeals and a petition for review to the State Supreme Court.

Each forum, with the concurrence of the City of Seattle, assumed for the purposes of its decision that petitioner was entitled to due process before the trial board and that he had been denied this right, but concluded that no prejudice could have been suffered because of the de novo hearing by the civil service commission, and refused to examine the department trial board hearing.

Petitioner has timely raised the federal question of violation of his right to due process by the department trial board at all stages of the proceedings. In his opening statement and at the conclusion of the department's case before the civil service commission, petitioner's former counsel moved to dismiss the proceedings on the grounds that the trial

had violated petitioner's right to due process, which violation would not be cured by a de novo hearing. The commission ruled that it could not examine the conduct of the trial board hearing./ (Exhibit 20, p. 15-16; Exhibit 21, p. 23-26) In the Superior Court for King County, petitioner's complaint and memorandum of authorities renewed the question of the violation of petitioner's right to due process. The trial court resolved the issues on the pleadings and briefs, without hearing testimony, and in its conclusion of law number I ruled that the civil service commission de novo hearing cured any defects which might have existed in the department hearing (App. A, p. A-19). In petitioner's brief to the State Court of Appeals, he assigned error to the trial court's conclusion of law number I. The State Court of Appeals affirmed the trial court (App. A, p. A-13). After petitioner's petition for rehearing to the Court of

Appeals had been denied without opinion (App. A, p. A-13), petitioner petitioned the State Supreme Court for review, which was denied without opinion (App. A, p. A-14).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE WASHINGTON COURT OF APPEALS BELOW IS IN CONFLICT WITH THIS COURT'S HOLDING IN Ward v. Village of Monroeville, 409 U.S. 57 (1972).

For the purpose of its decision, the Washington Court of Appeals accepted that petitioner's status as a civil service employee was a constitutionally protected property right, that the charges of cowardice made against him could constitute a deprivation of his liberty within the scope of Board of Regents v. Roth, 408 U.S. 564 (1972), and that petitioner had not been afforded due process by the trial board. However, because petitioner had availed himself of his statutory right to a de

novo hearing before the civil service commission, the Washington Court of Appeals concluded with reliance on McTiernan v. Gronouski, 337 F.2d 31 (2d Cir. 1964), that whatever violations of petitioner's rights to due process may have occurred were cured by the subsequent hearing.

The conclusion of the Washington Court of Appeals is in direct conflict with this Court's decision in Ward v. Village of Monroeville, 409 U.S. 57 (1972). In Ward, the petitioner urged that he had been denied his right to the appearance of justice by the dual responsibilities of the judge who also served as city mayor with responsibilities for revenue production, a substantial portion of which was received through the imposition of fines. In Ward, as in the present case, the respondent city urged that any unfairness at the original trial had been cured by the subsequent trial de novo. While the Ward

case was concerned only with the denial of the appearance of justice and not with the denial of the substance of justice, the court rejected the argument that the second trial cured the unfairness of the first:

> This "procedural safeguard" does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor in any event may the state's trial court procedure be deemed constitutionally acceptable simply because the state eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance. At 61-62.

The Washington court's reliance on McTiernan, supra, was misplaced. If, as occurred in McTiernan, the initial hearing contains inadvertent errors but not errors which when reviewed, appear to go to the very heart of the hearing process itself, then presumably a de novo hearing would appropriately cure such errors. Even the most skilled and well intentioned judge

will err on occasion. If a remedy for such errors is provided, the entire proceeding should not be held void in such circumstances as do not threaten the integrity of the hearing. Where, however, as in this case, the litigant claims he was so deprived of his basic due process rights that he has, in effect, received no hearing, a subsequent hearing would not be sufficient to protect the litigant or the judicial system. Cf. Foster v. Carson School District, 63 Wn.2d 29, 385 P.2d 367 (1963). A litigant is not entitled to a perfect hearing. A litigant is entitled not to be deprived of his hearing by errors which are so serious as to render the "hearing" an encounter.

II. THE DECISION OF THE WASHINGTON COURT OF APPEALS BELOW IS IN CONFLICT IN PRINCIPAL WITH THIS COURT'S DECISIONS.

It is well established that, in the absence of an emergency situation, both

notice and opportunity for hearing must be afforded before the state may deprive one of a protected property interest or liberty. Bell v. Burson, 402 U.S. 535 (1970). It has not been and it is not petitioner's position now that, in this regard, the administrative regulations do not provide a constitutionally appropriate procedure to protect the rights of employees since the system does provide for a pre-termination hearing by the trial board.

The Washington Court of Appeals concluded that while the civil service commission hearing occurred subsequent to termination, it was sufficient because petitioner had not challenged the propriety of the civil service commission hearing and had not expressly contended that a hearing should have preceded his termination.

The issue in this case is not whether petitioner was entitled to a hearing before termination of his employment, but rather

whether this right can be frustrated by affording a meaningless, if not harmful, first hearing and then asserting that a hearing offered subsequent to termination would cure any defects in the first hearing.

Opp Cotton Mills v. Administrator, 312 U.S. 126 (1940); Goldberg v. Kelly, 397 U.S. 254 (1969); Wisconsin v. Constantineau, 400 U.S. 433 (1970); Bell v. Burson, 402 U.S. 535 (1970); Board of Regents v. Roth, supra; and Perry v. Sindermann, 408 U.S. 593 (1972) all clearly establish the right to have notice and an opportunity for a hearing appropriate to the circumstances before the state may deprive one of his constitutionally protected property interest or before the state may take action, the effect of which is to so stigmatize as to substantially impair the ability to obtain other employment.

In the present case, the administrative regulations provide for a hearing procedure which on its face would be

constitutionally appropriate in the circumstances. In this respect, the administrative regulations in this case are harmonious with the decisions of the Supreme Court. However, the decision below that the availability of a subsequent de novo hearing after termination precludes the employee from challenging the constitutional quality of the hearing first received is in conflict with the principles enunciated by this Court.

The effect of the decision below is to require a pre-termination hearing in form, but not in substance. The blanket refusal to review the quality of the hearing offered in the first instance effectively denies an enforceable right to a pre-termination hearing.

The system sanctioned below and insulated from inspection by the decision of the Washington Court of Appeals has the practical effect of not only denying

a meaningful pre-termination hearing, but also sanctions a system where potentially, as petitioner claims in this case, the department not only denies a hearing to the employee but uses this stage of the proceeding to harrass and isolate the employee and deter him from exercising his rights.

The right to a hearing before one's employment is taken from him is an invaluable right which this Court's decisions have established. However, the decision below errodes the efficacy of those decisions by reducing the requirement to one of form only. If petitioner had simply been denied a hearing before his termination, no one would deny he had been wronged. Can it be said that petitioner was any the less harmed because he was allowed a hearing in name only which served, if it served any role at all, to discourage petitioner from asserting his constitutional

right to job security in the absence of good cause for his termination established at a fair hearing.

III. IMPORTANCE OF DECISION BY THE SUPREME COURT OF THE ISSUE PRESENTED.

It has become increasingly well established that many forms of public employment are protected from arbitrary action by the shield of the 14th Amendment. See, e.g., Board of Regents v. Roth, supra. The critical question presented by this case is whether this right to basic procedural fairness may be weakened or denied by requiring the employee to run a gantlet of harrassment before he is allowed an unbiased hearing.

The importance of the issue presented in this case cannot be assessed without reflection on the nature of the hearing that petitioner claims he first encountered. The record sketches the broad outlines of a trial board hearing where petitioner

was brought before his superior officers and accused of cowardice and incompetence, isolated and unable to communicate with anyone, even his own counsel, denied an opportunity to cross examine the witnesses against him, unable to call witnesses in his own behalf, subjected to leading and accusatory questioning--in short, emotionally stripped naked and then terminated by the formal action of the department chief.

This case highlights the subtle danger of an unsubtle technique, the effect of which is to allow only the strong and persistent to enjoy their constitutional rights.

Since petitioner has persisted, the result in this case perhaps will affect those who follow petitioner more than petitioner. If the law is to allow, without objection, those entitled to a fair hearing to experience a hearing which is

in fact the reverse, can public employees be expected to have faith in the judicial process to protect their rights? The danger is high that public employees will be deterred from exercising their rights to fair treatment if the procedure which is claimed to have been employed in this case is declared unreviewable. The danger lies not only in the potential effect on the employee threatened with termination, but also in the likely effect on those fellow employees who could testify on his behalf. Although petitioner was not allowed to call witnesses to support him at the trial board hearing, even the record of the subsequent civil service hearing, <u>in fra</u>, p. 23 and 24, illustrates the chilling effect of a witness's fear that the department will not treat him fairly. Perhaps it is not possible to totally eliminate an employee's apprehension that his unfavorable testimony will be held against

him. If procedural due process is to be meaningful, the causes for apprehension should be minimized by enforcing basic fairness. The alternative is to deny any hearing to the many for whom the price of exercising their rights would prove too high.

Although the court below has so held, it seems no answer to say that, despite the harsh treatment of petitioner by the department, he persisted and received a de novo hearing by the civil service commission.

As discussed supra at p. 6 and 7, the failure of the trial board to accord petitioner a meaningful opportunity to meet the charges against him or to clear his name before loss of employment was sufficient in itself to refuse to proceed to yet another hearing. It is not justice to offer another hearing to a person who has already experienced a hearing before the trial board.

Nor could the civil service commission

hearing be free of the taint of the trial board. The trial board hearing unavoidably affected all hearings which followed. At the eventual hearing before the civil service commission, petitioner remained subject to cross examination and attempts at impeachment based on testimony given at the trial board hearing, the errors of which were to be cured by the subsequent de novo hearing:

> Q [by Assistant Chief Hanson] At this same hearing [the department's trial board] last April, didn't you indicate that Chief Collins was not telling the truth?
>
> MR. HEAVEY [petitioner's then counsel]: I am going to object.
>
> MR. HANSON: Well, this is insubordination [one of the charges against petitioner], Mr. Chairman, he is in effect calling the Battalion Chief a liar, unless he can prove it.
>
> MR. HEAVEY: Oh, boy, he has really reached for that one. First of all--well, without the proper foundation there--
>
> MR. HANSON: You were there, Mr. Heavey?

MR. HEAVEY: You are right, I was there and he said, "I disagree with the Captain," and if you want to go into the hearing, fine.

Even though petitioner had not been allowed to present any witnesses at the trial board hearing, the effect of the fear, whether justified or not, of later misuse by the fire department of testimony was apparent at the civil service commission. One of petitioner's witnesses identified a document which suggested a concerted effort by the fire department to deny petitioner access to potential witnesses, but refused to identify the fireman who first produced the document:

Q [by Mr. Heavey] Did you turn this over to me?

A I don't know where it came from, sir, no.

Q Where did you get it?

A It was given to me to give to you.

Q By whom?

A I don't want to say.

Q By another fireman?

A Yes.

Q Where did he say he got it?

A Well, it says here, it says Battalion 4.

Q Why don't you want to tell us who gave it to you?

A Well, because I don't think it would be a good idea.

Q Why?

A Well, because he would probably get in trouble--

Q Are you saying there is a certain amount of pressure going on and this sort of thing with regard to this matter?

A Well, I think the pressure is more imagined than it is in actuality but it certainly is imagined.

Q In other words, the fear of retaliation?

A This is a possibility.

The same witness' testimony on cross examination by Assistant Chief Hanson provides the flavor of the effect of a subordinate in a para-military organization when con-

fronted by a superior officer:

> Well, I said that pressure, I am sure, is more imagined, because I think the fireman have a great respect for you [Chief Hanson who was acting as department prosecutor at the hearing] but at the same time they feel this pressure which, I don't know if it is there or not. I don't think it has ever been there for me and I have had quite a few run-ins with you and--not your fault, sir, mine, of course. [Emphasis supplied.]

The errors which are claimed to have occurred in this case are not isolated, mistaken rulings, but errors which affect the very essence of a hearing. If the first hearing is totally insulated from review, the danger exists that such abuses would become endemic to the system. As was observed in Ward v. Village of Monroeville, supra, the possibility of subsequent reversal of result alone is insufficient deterence. Indeed, the more abusive the first hearing is, the less likely is the employee to continue on with his attempt

for vindication.

Candor compels petitioner to acknowledge that because of the refusals below to review the trial board hearing, the extent of the claimed abuses by the trial board is not fully explored in the record, and were petitioner ultimately to secure a reversal, a remand to consider the conduct of the trial board hearing would probably be necessary. By like token, however, this case is an unusually apt vehicle for the resolution of the issue presented since the questions of petitioner's entitlement to procedural due process and the violation of that right are not in issue. Because this case is not encumbered with collateral questions, it offers an opportunity for the Court to deal directly with an issue posed which has a direct bearing on the continued vitality of the court's previous decisions in the area of procedural due process. In the last analysis,

procedural protections will be meaningless if fair treatment of the employee does not characterize the entire proceeding.

CONCLUSION

The Petition for a Writ of Certiorari to the Washington Court of Appeals should be granted.

Respectfully submitted,

JOHN D. BLANKINSHIP
LYNN O. HURST
JEFFREY L. PEWE

MONTGOMERY, PURDUE, BLANKINSHIP & AUSTIN

1515 Norton Building
Seattle, Washington 98104,

Counsel for Petitioner.



LIBRARY
SUPREME COURT, U. S

Supreme Court, U. S.
FILED
OCT 23
MICHAEL RODAK, JR.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-480

HENRY R. DEERING,

Petitioner,

vs.

CITY OF SEATTLE, a Municipal Corporation, and THE SEATTLE CIVIL SERVICE COMMISSION, HERBERT STEPHENS, Chairman, E. A. COOK and MERLIN BROWN, Members,

Respondents.

APPENDICES TO

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals
of the State of Washington

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No._____

HENRY R. DEERING,

Petitioner,

vs.

CITY OF SEATTLE, a Municipal Corporation, and THE SEATTLE CIVIL SERVICE COMMISSION, HERBERT STEPHENS, Chairman, E. A. COOK and MERLIN BROWN, Members,

Respondents.

APPENDICES TO

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals
of the State of Washington

APPENDIX A

OPINION OF THE COURT OF APPEALS OF WASHINGTON

HENRY R. DEERING, Appellant

vs.

THE CITY OF SEATTLE, et al., Respondents

(No. 2058-1--Decided April 1, 1974)

JAMES, J.--Plaintiff, Henry Deering, was a Seattle fireman for approximately 8-1/2 years and had achieved "regular" as distinguished from "probationary" civil service status. He received written notice from the fire chief that, because of charges submitted by his superior officers, a "trial board" "disciplinary" hearing would be conducted pursuant to Seattle fire department regulation 5.04.03(c). A hearing was held and the trial board recommended that "Deering's employment in the Department should be terminated." Thereafter, the chief, acting in his capacity as the

"appointing authority" and pursuant to Seattle civil service rule 12.03, "discharged" Deering by filing "a written statement of the reasons for such discharge with the [civil service] Commission." In response to a "notice" from the commission and pursuant to article 16, section 12 of the city charter and civil service rule 12.04, Deering requested and was granted an "investigation" of the reasons given for his discharge.

The commission concluded that Deering's discharge was justified. Deering filed a petition for writ of mandate in superior court seeking reinstatement and back pay. The trial judge refused to consider Deering's offer of proof concerning the conduct of the trial board hearing. He determined, as a matter of law, that the trial board hearing was "without legal significance, and the manner in which said Fire Department hearing was conducted is

not judicially reviewable." Conclusion of law No. 1.

The trial judge confined his consideration to a review of the record of the civil service commission "investigation." He found that Deering was represented by counsel, presented evidence, and was permitted to cross-examine adverse witnesses. He found that substantial evidence supported the commission's conclusion that Deering's discharge was for "just cause." He concluded that the commission did not act in an arbitrary and capricious manner and denied Deering's petition.

On appeal, Deering's first argument is that "[h]e that takes the procedural sword shall perish with that sword." Vitarelli v. Seaton, 359 U.S. 535, 3 L.Ed. 2d 1012, 79 S.Ct. 968 (1959) (Frankfurter, J., concurring in part, dissenting in part). He reasons that while there is no civil service provision requiring a trial board

disciplinary hearing, the department's own rules make such a hearing mandatory. Deering asserts that the fire department violated both the letter and spirit of its own rule which provides that:

> To insure fair and just treatment of the offender, the Personnel Officer will conduct disciplinary hearings only after accumulating all evidence and in the presence of all witnesses which he and the accused may consider necessary.

Fire department rule 5.04.03(c)(3). He alleges that the trial board's failure to follow its own rules so "tainted" all subsequent proceedings that they were void and his dismissal invalid. He specifically alleges that at the hearing he was "denied [the] right of counsel; denied the right to cross-examine his accusers; and denied the right to call witnesses in his behalf."

Deering cites in support of this argument Vitarelli v. Seaton, supra; Dillon v. Lapeer State Home & Training School, 364 Mich. 1, 110 N.W.2d 588 (1961); and Brin-

instool v. New Mexico State Bd. of Educ., 81 N.M. 319, 466 P.2d 885 (1970). But in none of these cases was a de novo hearing available to the discharged employee. Moreover, Dillon and Brininstool both involve hearings required by statute.

In response, the defendants cite McTiernan v. Gronouski, 337 F.2d 31 (2d Cir. 1964), in which a postal employee sought reinstatement. The employee argued that during the investigation which preceded his dismissal, the post office violated a postal manual regulation requiring disclosure of evidence. The court observed that the employee requested and received a de novo civil service commission hearing and that prior to that hearing the employee received notice of the evidence against him. The opinion concluded that

> any error which may have clouded the earlier proceedings because of this non-disclosure has been cured, and appellant cannot now rely on that

> non-disclosure in pressing his efforts to have his dismissal overturned. Green v. Baugham, 100 U.S.App.D.C. 187, 243 F.2d 610 (D.C.Cir.), cert. denied, 355 U.S. 819, 78 S.Ct. 25, 2 L.Ed.2d 35 (1957).

(Footnote omitted.) McTiernan v. Gronouski, supra at 35. Similarly, under Seattle's city charter the civil service commission is also required to give a de novo hearing and exercise its independent judgment. State ex rel. Perry v. Seattle, 69 Wn.2d 816, 420 P.2d 704 (1966). We find the reasoning of McTiernan persuasive.

Deering makes the related argument that the trial board hearing was constitutionally defective in failing to provide procedural due process. We will assume that Deering's status as a civil service employee is a constitutionally protected "property" right,[1/] cf. Helland v. King

---

[1/] Deering also claims that the charges developed at the trial board hearing "branded" him "for life with false accusations" of cowardice. Arguably, such an assault upon

County Civil Service Comm'n, 10 Wn.App. 683, 685 n.1, 519 P.2d 258 (1974), and that he may not be deprived of that right without due process of law.

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Baldwin v. Hale, 68 U.S. 223, 233 [17 L.Ed 531 (1863)]. See Windsor v. McVeigh, 93 U.S. 274 [23 L.Ed. 914 (1876)]; Hovey v. Elliott, 167 U.S. 409 [42 L.Ed. 215, 17 S.Ct. 841 (1897)]; Grannis v. Ordean, 234 U.S. 385 [58 L.Ed. 1363, 34 S.Ct. 779 (1914)]. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 [14 L.Ed.2d 62, 85 S.Ct. 1187 (1965)].

Fuentes v. Shevin, 407 U.S. 67, 80, 32 L.Ed. 2d 556, 92 S.Ct. 1983 (1972).

Though Deering strenuously argues that the trial board hearing contaminated the

---

reputation could be a deprivation of an individual's constitutionally protected "property" or "liberty." See Board of Regents v. Roth, 408 U.S. 564, 573, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972).

commission hearing, neither in his brief on appeal nor in his oral argument has he been able to explain any way in which the commission hearing was affected. The record discloses that the commission refused to consider any evidence concerning the substance or conduct of the trial board hearing. The trial board's only function was to investigate the charges against Deering and to make a disciplinary "recommendation" to the fire chief. Therefore, Deering suffered no "deprivation" as a consequence of that hearing. His deprivation occurred when he was discharged by the fire chief.

Although the appropriate charter and civil service provisions speak of "removal" and "discharge" of a civil service employee by the "appointing authority," it is clear that, as provided by civil service rule 12.03,

> [a] regular employee may be discharged from the City service only upon the filing by the appointing authority of

> a written statement of the reasons for such discharge with the Commission;

(Italics ours.) and that thereafter, as provided by article 16, section 12 of the city charter and civil service rule 12.04, the final decision shall be made by the commission. After an employee's demand for an "investigation," his "discharge" becomes at most a temporary "suspension" and the "reasons" assigned by the chief for his dismissal become merely charges which the department must prove to the satisfaction of the commission in a de novo proceeding.

Deering has not questioned the timeliness of the commission hearing by contending that a hearing should have preceded his "suspension," cf. Kennedy v. Sanchez, 349 F.Supp. 863 (N.D. Ill. 1972), prob. juris. noted sub nom., Phillips v. Kennedy, 411 U.S. 915, 36 L.Ed.2d 306, 93 S.Ct. 1549 (1973), and we do not reach this question. Neither does Deering assert that he was

denied due process at the commission hearing. Because Deering was afforded a due process hearing at a "meaningful time and in a meaningful manner," due process was not required at the trial board hearing.

Deering next argues that the commission considered new and different charges from those submitted to it. Among the "reasons" assigned for his discharge were the following:

1. Incompetency and inefficiency in the performance of his duties;

2. Failure to acquire satisfactory knowledge of required Fire Department subjects and to develop the skills required of individual firemen;

. . .

4. Insubordination and failure to comply with the orders and directions of his superiors.

Deering argues that two of the commission's "findings" were not included in the "reasons" and that therefore the commission based its decision on charges which were

not submitted to it. The challenged parts of the "findings" are as follows:

> That in fighting a fire at the house of the Good Shepherd in August, 1967, Henry R. Deering failed to willingly and efficiently perform his duties. . . .that [Deering] had failed to work a hydrant properly when fighting a fire, which may have contributed to property loss, . . .

Deering's fundamental right to "notice" required that the commission's inquiry be limited to an investigation of the "reasons" given for discharge. Fuentes v. Shevin, supra. However, if the notice given is reasonably calculated to inform as to the nature and substance of the charges, it is constitutionally adequate. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 94 L.Ed. 865, 70 S.Ct. 652 (1950). A generally described "reason" for discharge may be established by proof of specific acts of misconduct. Cf. State ex rel. Perry v. Seattle, 62 Wn. 2d 891, 384 P.2d 874 (1963); State ex rel.

Perry v. Seattle, 69 Wn.2d 816, 420 P.2d 704 (1966).

Here, the challenged findings clearly support the given "reasons." The failure to "willingly and efficiently" perform his duties supports the charges of "inefficiency" and "failure to comply with the orders and directions of his superiors." The failure "to work a hydrant properly" supports the charges of "incompetency and inefficiency" and "failure to acquire satisfactory knowledge." Deering makes no claim that he was surprised by testimony concerning these incidents or that he requested additional time to refute the department's evidence. Nor does he claim that the "reasons" given were too general to give him constitutionally adequate notice. Under these circumstances, we see no error.

Finally, Deering argues that the commission's findings and conclusion are

not supported by substantial evidence and should be reversed. Our review of the record discloses substantial evidence to support the findings and conclusion and therefore we may not disturb them. State ex rel. Perry v. Seattle, 69 Wn.2d 816, 420 P.2d 704 (1966).

Affirmed.

FARRIS and WILLIAMS, JJ., concur.

ORDER OF THE WASHINGTON COURT OF APPEALS DENYING PETITION FOR REHEARING

HENRY R. DEERING, Appellant

vs.

THE CITY OF SEATTLE, et al., Respondents

(No. 2058-1--Entered May 14, 1974)

The court having considered the appellant's petition for a rehearing herein and being of the opinion that it should be denied; Now, therefore,

IT IS ORDERED that the petition be and it is hereby denied.

ORDER OF THE WASHINGTON SUPREME COURT DENYING PETITION FOR REVIEW

HENRY R. DEERING, Petitioner,

vs.

THE CITY OF SEATTLE, et al., Respondents

(No. 43301--Entered July 30, 1974)

The Court having considered the petition for review of the decision of the Court of Appeals in this cause together with the answer thereto,

It is ordered that the petition be and it is hereby denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE SUPERIOR COURT FOR KING COUNTY, WASHINGTON

HENRY R. DEERING, Plaintiff

vs.

THE CITY OF SEATTLE, et al., Defendants

(No. 714 329--Entered July 2, 1970)

This matter having come on regularly for trial on the 11th day of June, 1970

before the undersigned judge of the above entitled court, sitting without a jury, no jury having been requested, and plaintiff having appeared in person and by his counsel, James D. Picton of Heavy & Picton, and defendants having appeared by their attorneys, A. L. Newbould, Corporation Counsel, and E. Neal King, Assistant, and documentary evidence having been introduced relating to the hearing held by the Civil Service Commission of The City of Seattle for the purpose of inquiring into the dismissal of plaintiff from his position in the Fire Department, and the Court having considered said documentary evidence and having rejected oral testimony offered by plaintiff and having heard the argument of counsel and being fully advised in the premises, the Court now makes these

FINDINGS OF FACT

I.

Plaintiff Henry R. Deering was appoint-

ed to a position in the Fire Department of The City of Seattle in October 1959, and duly completed his six-month probationary period. On or about May 2, 1968, the Chief of the Fire Department dismissed plaintiff from the Fire Department and pursuant to Article XVI § 12 of the Charter of The City of Seattle filed a statement in writing of the reasons therefor with the Civil Service Commission.

II.

Prior to plaintiff's dismissal from the Fire Department, a disciplinary hearing was held by the Fire Department. Regulations of the Fire Department promulgated by the Chief of the Fire Department established certain procedures for disciplinary hearings. The Court makes no finding as to whether there was compliance with such regulations in the case of plaintiff.

III.

Pursuant to timely demand by the

plaintiff as provided in Article XVI § 12 of the Charter of The City of Seattle, the Civil Service Commission of said City held an investigation into the dismissal of plaintiff from the service of the Fire Department. Said investigation was in the form of a series of three hearings which were held on August 21, 1968, September 11, 1968, and September 25, 1968 at which hearings plaintiff appeared in person and was represented by counsel and at which sworn testimony was heard and exhibits introduced with plaintiff's attorney having the right to cross-examine, and to call witnesses upon plaintiff's behalf.

IV.

Subsequent to the conclusion of said hearings, the Civil Service Commission of The City of Seattle found that at a fire in August 1967, "Henry R. Deering failed to willingly and efficiently perform his duties" and that "though he had been in

the department for eight years and six months and that in that period of time he had been trained in all phases of a fireman's duties, at various times he had failed to perform satisfactorily in the drill evolutions, that he had failed to work a hydrant properly when fighting a fire, which may have contributed to property loss, and that he had failed to learn how to drive the heavy equipment of the Fire Department, and that in such period of time he should have learned the skills and acquired the knowledge he demonstrably lacked." From such findings it concluded that "as its independent judgment on the merits of the matter", "Henry R. Deering displayed incompetency and inefficiency in the performance of his duties as a fireman", that in over eight years of service "he failed to acquire satisfactory knowledge of the required department's subjects and failed to develop the

skills required of individual firemen, and that his dismissal "was for just cause."

V.

The records of said series of three hearings contain substantial evidence to support the factual findings of the Civil Service Commission and its conclusions therefrom including its conclusion that plaintiff's dismissal was for just cause.

From the foregoing findings of fact the Court makes the following

CONCLUSIONS OF LAW

I.

The disciplinary hearings held by the Fire Department of The City of Seattle prior to plaintiff's dismissal from his position in said department was without legal significance, and the manner in which said Fire Department hearing was conducted is not judicially reviewable.

II.

In reviewing the action of the Civil

Service Commission of The City of Seattle, this court cannot inquire into the weight or sufficiency of the evidence but can inquire only as to whether there is competent evidence to support the findings of the Civil Service Commission.

III.

The findings of the Civil Service Commission of The City of Seattle as to the dismissal of plaintiff are supported by substantial evidence in the records of the series of three hearings held by said Commission to investigate plaintiff's dismissal.

IV.

The grounds sustained by the Civil Service Commission for the dismissal of plaintiff are not frivolous.

V.

The requirements of Article XVI § 12 of the Charter of The City of Seattle were fully complied with in respect to the

dismissal of plaintiff from the Fire Department of The City of Seattle, and he was granted the right of a full and complete hearing with the aid of counsel, and the Civil Service Commission in sustaining the dismissal did not act in an arbitrary and capricious manner.

VI.

The plaintiff is not entitled to the relief sought in this action and his action should therefore be dismissed.

FINDINGS OF THE SEATTLE CIVIL SERVICE COMMISSION HEARING

HENRY R. DEERING

Whereas, on August 21, 1968, continued on September 11, 1968, and continued on September 25, 1968, an investigation was made by the Civil Service Commission of the dismissal of Henry R. Deering; and evidence having been heard, the Commission makes the following Findings of Facts:

I.

That due and proper notice of this hearing was given Mr. Deering who was at all times personally present and was represented by counsel, Mr. Edward Heavey.

II.

That the Fire Department was represented by its Assistant Fire Chief Frank R. Hanson.

III.

That in fighting a fire at the house of the Good Shepherd in August, 1967, Henry R. Deering failed to willingly and efficiently perform his duties.

IV.

That though he had been in the department for eight years and six months and that in that period of time he had been trained in all phases of a fireman's duties, at various times he had failed to perform satisfactorily in the drill evolutions, that he had failed to work a hydrant pro-

contributed to property loss, and that he had failed to learn how to drive the heavy equipment of the Fire Department, and that in such period of time he should have learned the skills and acquired the knowledge he demonstrably lacked.

From the preceding Findings of Fact, this Commission concludes as its independent judgment on the merits of the matter, that:

I.

Henry R. Deering displayed incompentency and inefficiency in the performance of his duties as a fireman and in spite of the over eight years service, during which time training opportunities were afforded him, he failed to acquire satisfactory knowledge of the required fire department's subjects and failed to develop the skills required of individual firemen.

II.

The dismissal of Henry R. Deering was

for just cause.

The action of the Fire Chief is therefore sustained.

APPENDIX B

CITY OF SEATTLE CHARTER PROVISIONS

Article 16, Section 12: TENURE IN CLASSIFIED SERVICE; REMCVAL FOR CAUSE; INVESTIGATION; REINSTATEMENT; SUSPENSION; OATHS AND EVIDENCE: Every officer or employee in the classified civil service shall hold office until removed or retired. Any officer or employee whose appointment is complete may be removed by the appointing power only upon the filing with the commission of a statement in writing of the reasons therefor. Any officer or employee so removed may within ten days after his removal demand an investigation. The Commission shall forthwith make such investigation and its finding and decision shall be certified to the appointing officer, and if the removal is not sustained thereby, the officer or employee so removed shall at once be reinstated. . . .

CITY OF SEATTLE CIVIL SERVICE LAWS AND RULES

1.18 DISCHARGE: Separation from service for cause.

RULE 12--SUSPENSION, DEMOTION, DISCHARGE

12.03 DISCHARGE:

a. A regular employee may be discharged from the City service only upon the filing by the appointing authority of a written statement of the reasons for such discharge with the Commission;

b. The following are declared to illustrate adequate causes for discharge; a discharge may be made for any other good cause. . . .

SEATTLE FIRE DEPARTMENT REGULATIONS

ARTICLE 5
DISCIPLINE

5.04.03 RESPONSIBILITIES

(c) The Personnel Officer (Assistant Chief)

The Personnel Officer will provide general advice and assistance to

Battalion and the Deputy Chiefs on disciplinary actions. He also will insure that proposed disciplinary actions are consistent with Civil Service Rules, Department regulations, policy and Department-wide practices.

(1) In all disciplinary actions involving possible suspension or dismissal, he will conduct a hearing with three chiefs sitting as a Trial Board. One of these chiefs shall be the Assistant Chief and the other two chiefs shall be chosen by the defendant from a panel of six chiefs available for this purpose. . . In addition to such witnesses as are necessary, the defendant may have any one person he desires present as an observer. The decision of the trial board will be by a majority vote of the three chiefs sitting as the Board. The decision of the Board will then be submitted to the Chief of the Department who may reduce the penalty but

may not increase it.

* * *

(4) In all disciplinary actions he will forward changes, letters of investigation and his recommendation for action to the Fire Chief for final adjudication.

SUPREME COURT, U. S.

Supreme Court
L E
NOV 18
MICHAEL RODAK, J

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-480

HENRY R. DEERING,
Petitioner,

v.

CITY OF SEATTLE, a Municipal Corporation, and THE SEATTLE CIVIL SERVICE COMMISSION, HERBERT STEPHENS, Chairman, E. A. COOK and MERLIN BROWN, Members,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, DIVISION I, OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENTS IN OPPOSITION

Office and Post Office Address:
10th Floor, Seattle Munic. Bldg.
Seattle, Washington 98104
Telephone: 583-2338

JOHN P. HARRIS
Corporation Counsel
The City of Seattle
Attorney for Respondents

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

SUBJECT INDEX

	Page
Questions Presented	1
Seattle City Charter and Seattle Civil Service Rules Involved	2
Statement of the Case	3
Argument	5
Conclusion	8

TABLES OF AUTHORITY

Table of Cases

Arnett v. Kennedy, ... U.S. ....., 40 L. Ed. 2d 15, 94 S. Ct. 1633 (1974)	5
Deering v. City of Seattle, 10 Wn. App. 832, 520 P.2d 638 (1974)	6, 7
Luellen v. Aberdeen, 20 Wn.2d 594, 148 P.2d 849 (1944)	4
State ex rel. Perry v. City of Seattle, 69 Wn.2d 816, 420 P.2d 704 (1966)	4
Ward v. Village of Monroeville, 409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80 (1972)	7
Wilson v. City of Minneapolis, 283 Minn. 348 168 N.W.2d 19 (1969)	7

Other Authority

Seattle City Charter, Art. XVI § 9	3
§ 12	2-3, 4
Seattle Civil Service Rule 12.03	3
Supreme Court Rule 23(f)	8

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-480

HENRY R. DEERING,
Petitioner,

v.

CITY OF SEATTLE, a Municipal Corporation, and THE SEATTLE CIVIL SERVICE COMMISSION, HERBERT STEPHENS, Chairman, E. A. COOK and MERLIN BROWN, Members,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, DIVISION I, OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Where applicable provisions of the Seattle City Charter governing the City's civil service system provide that the head of a department may dismiss a civil service employee who has completed his probationary period by filing with the Civil Service Commission a statement in writing of the reasons therefor, and where such a dismissed employee is en-

titled to a *de novo* hearing before the Civil Service Commission, did alleged due process violations occurring at a departmental hearing prior to termination so affect the subsequent Civil Service Commission proceedings that the dismissed employee was denied due process?

2. In the context of a civil service system created by the provisions of a municipal charter, does the purported denial of due process to an employee during a hearing held by the City department which employed him raise any significant constitutional question where such departmental hearing was neither required or contemplated by applicable charter provisions and where such charter provides a full *de novo* hearing before a municipal civil service commission upon dismissal?

SEATTLE CITY CHARTER AND SEATTLE CIVIL SERVICE RULES INVOLVED

Seattle City Charter, Art. XVI § 9. ". . . The appointing officer shall notify the commission separately of each position to be filled, and shall fill such places by appointment from the persons certified to him by the commission therefor, which appointment shall be on probation for a period of twelve months, except for firemen where such period shall be six months . . . . Before the expiration of the period of probation, the head of the department or office in which a candidate is employed may, by and with the consent of the commission, discharge him upon assigning in writing his reasons therefor to the commission. If he is not then discharged his appointment shall be deemed complete. . . ."

Seattle City Charter, Art. XVI § 12. "Every officer or employee in the classified civil service shall hold office until removed or retired. Any officer or employee whose appointment is complete may be removed by the appointing power only upon the filing with the

commission of a statement in writing of the reasons therefor. Any officer or employee so removed may within ten days after his removal demand an investigation. The commission shall forthwith make such investigation and its finding and decision shall be certified to the appointing officer, and if the removal is not sustained thereby, the officer or employee so removed shall at once be reinstated. . . . In the course of any investigation each member of the commission or their designated agents shall have the power to administer oaths, and shall have the power to require the attendance of any officer or employee or other person and the production of books and papers relevant to such investigation."

Seattle Civil Service Rule 12.03. "a. A regular employee may be discharged upon the filing by the appointing authority of a written statement of the reasons for such discharge with the Commission;

b. The following are declared to illustrate adequate causes for discharge; a discharge may be made for any other good cause;

° ° °

(3) Willful or intentional violation of any lawful and reasonable regulation, order or direction made or given by a superior officer;

° ° °

(5) Incompetency or inefficiency in the performance of the duties of his position. . . ."

STATEMENT OF THE CASE

Petitioner Henry R. Deering was dismissed from his employment as a fireman for the City of Seattle on May 2, 1968. Said dismissal was effectuated by the Chief of the Seattle Fire Department in accordance with applicable provisions of the Seattle City Charter by filing a written statement of the reasons for the dismissal with the Seattle Civil Service Commission. Because petitioner had com-

pleted his probationary period, he was entitled to "demand an investigation" by the Civil Service Commission, provided that such demand be filed within ten days. Seattle City Charter, Article XVI § 12. When such a demand is filed, the same charter provision directs that "The commission shall forthwith make such investigation and its finding and decision shall be certified to the appointing officer. . . ." In *Luellen v. Aberdeen*, 20 Wn.2d 594, 148 P.2d 849 (1944), the Washington Supreme Court construed similar municipal civil service provisions to provide for a hearing after due notice, including the right to present witnesses and be represented by counsel. Petitioner was accorded such rights before the Seattle Civil Service Commission, and, indeed, exercised such rights.

After receiving evidence from both the Seattle Fire Department and the petitioner, the Civil Service Commission concluded "as its independent judgment on the merits of the matter," that "Henry R. Deering displayed incompetency and inefficiency in the performance of his duties as a fireman and in spite of the over eight years service, during which time training opportunities were afforded him, he failed to acquire satisfactory knowledge of the required fire department's subjects and failed to develop the skills of individual firemen," and that such dismissal "was for just cause." As clearly indicated by the wording of the decision and in accordance with the construction of the applicable charter provisions by the Washington Supreme Court in *State ex rel. Perry v. City of Seattle*, 69 Wn.2d 816, 420 P.2d 704 (1966), such decision was rendered upon a *de novo* basis upon the merits of the dismissal.

The provisions of the Seattle City Charter do not require

or provide for any sort of hearing at the departmental level prior to the time that the department head files the written dismissal statement with the Civil Service Commission. However, the Chief of the Fire Department had promulgated regulations providing that cases involving possible suspension or dismissal would be heard by a "Trial Board" consisting of a panel of three chiefs. Because neither the Civil Service Commission nor the King County Superior Court deemed that the proceedings before the Seattle Fire Department "Trial Board" were of any relevance to their functions in reviewing the petitioner's dismissal, no evidence was taken as to what transpired at the hearing before such "Trial Board," and the only information in the record as to what did transpire before such "Trial Board" is the rather argumentative offer of proof made to the Civil Service Commission by the attorney who represented petitioner in the hearing before said Commission.

ARGUMENT

The principal theory advanced by petitioner as to why this court should grant his petition for a writ of certiorari is his claim that he was entitled to a hearing prior to his separation from City employment, and because of the alleged procedural defects, the hearing before the Seattle Fire Department's "Trial Board" did not constitute the sort of pretermination hearing which he contends is required by due process concepts. However, in *Arnett v. Kennedy*, ... U.S. ....., 40 L.Ed.2d 15, 94 S. Ct. 1633 (April 16, 1974), a majority of this court rejected the contention that a pretermination hearing is always required before a governmental employee may be dismissed from his employment. Two Justices of this court in the *Arnett*

case placed great weight upon the fact that under the procedures applicable to that case the discharged employee would heve recovered back wages if he prevailed before the Civil Service Commission upon the merits of his claim, and in the case at hand petitioner would similarly have been awarded back wages if he had prevailed before the Seattle Civil Service Commission.

Furthermore, at no time during the proceedings before the Civil Service Commission of The City of Seattle, or in the courts below, did petitioner contend that due process concepts require a pretermination hearing before a governmental employee may be dismissed. See *Deering v. City of Seattle,* 10 Wn. App. 832, 836-837, 520 P.2d 638, 641 (1974).

A further problem with petitioner's contention is that he ignores the proper relationship of the departmental action to the process specified in the Seattle City Charter for the review by the Civil Service Commission of dismissals of Seattle employees who have completed their probationary period. As pointed out by Division One of the Court of Appeals of the State of Washington in the instant case:

> "The trial board's only function was to investigate the charges against Deering and to make a disciplinary 'recommendation' to the fire chief. Therefore, Deering suffered no 'deprivation' as a consequence of that hearing. His deprivation occurred when he was discharged by the fire chief."

Deering v. City of Seattle, 10 Wn. App. 832, 836, 520 P.2d 638, 640 (1974). Said court also noted in its decision that under the Seattle City Charter procedures, "After an employee's demand for an 'investigation,' his 'discharge' be-

comes at most a temporary 'suspension' and the 'reasons' assigned by the chief for his dismissal become merely charges which the department must prove to the satisfation of the commission in a de novo proceeding." *Deering v. City of Seattle*, 10 Wn. App. 832 836, 520 P.2d 638, 641 (1974). The established charter procedures are important, because, as pointed out by the Supreme Court of Minnesota in response to a similar contention in *Wilson v. City of Minneapolis*, 283 Minn. 348, 168 N.W.2d 19, 22 (1969):

> "So far as the courts are concerned, the power and duty of the superintendent of police of the city of Minneapolis to suspend employees for disciplinary purposes is fixed by the charter of that city and the rule of its Civil Service Commission, unaffected by the superintendent's order announcing the procedures to be employed by him in suspension cases.
>
> • • •
>
> "The superintendent of police is given the authority and the duty to suspend temorarily those subject to his jurisdiction when in his judgment this is necessary for purposes of discipline. He is not authorized or required to make the exercise of this function dependent upon a 'formal hearing.' "

Because the only hearing contemplated or required by the Seattle City Charter is the hearing before the Civil Service Commission, the trial court was correct in holding that the hearing before the Seattle Fire Department's "Trial Board" "was without legal significance." Also for such reason the decision in *Ward v. Village of Monroeville*, 409 U.S. 57, 34 L.Ed.2d 267, 93 S. Ct. 80 (1972), is without relevance, because the hearing in that case which was found to violate due process was a judicial trial conducted pursuant to and in the manner contemplated by applicable state statutes.

Petitioner contended in the courts below that he was

denied procedural due process in the proceeding before the Seattle Fire Department's "Trial Board" and such denial of procedural due process, (which purportedly took place notwithstanding the presence of his attorney), somehow prejudiced his rights in the subsequent hearing conducted bythe Civil Service Commission. However petitioner failed in the courts below to explain in any way or to give any reasons as to how his rights were prejudiced before the Civil Service Commission, and the State of Washington Court of Appeals correctly rejected his contention that he had somehow been prejudiced in some unspecified way.

Petitioner now seeks to correct this failure at pages 21-26 of the petition by attempting to explain how and why he was prejudiced in his hearing before the Civil Service Commission by the alleged due process violations occurring during the hearing of the Seattle Fire Department's "Trial Board." Since this argument was not presented to the courts below and is now urged for the first time it cannot properly form a basis for the granting of the petition. Supreme Court Rule 23(f).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition of Henry R. Deering for a writ of certiorari should be denied.

Respectfully submitted,

JOHN P. HARRIS
Corporation Counsel
The City of Seattle
Attorney for Respondents